UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

SODEXO AMERICA LLC

and Case 21-CA-39086

PATRICIA ORTEGA, an individual

SODEXO AMERICA, LLC AND USC UNIVERSITY HOSPITAL

and Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and Cases 21-CA-39328

21-CA-39403

NATIONAL UNION OF HEALTHCARE WORKERS

Alice J. Garfield, Esq., for the General Counsel.

Sophia Mendoza, Union Representative, for National Union of Health Care Workers.

Linda Van Winkle Deacon and Lester F. Aponte, Esqs., (Bate, Peterson, Deacon, Zinn & Young, LLP), of Los Angeles, California, for the Hospital.

Mark T. Bennett, Esq., (Marks Golia & Finch, LLP) of San Diego, California, for Sodexo.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on February 28, 2011. The first charge was filed November 4, 2010¹ and the order consolidating cases, consolidated complaint and notice of hearing was issued November 24.

¹ All dates are in 2010 unless otherwise indicated.

The complaint as thereafter amended alleges that Sodexo America LLC and USC University Hospital have maintained a no access rule that violates Section 8(a)(1). The complaint also alleges that the Hospital unlawfully enforced that rule on several occasions. Sodexo and the Hospital filed timely answers that denied that the rule was unlawful.

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Before the hearing opened the Hospital filed a motion for summary judgment with the Board. The Board denied the motion without prejudice to its renewal at the hearing; Member Hayes dissented and would have granted the motion.

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Sodexo, and the Hospital, I make the following

Findings of Fact

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I. Jurisdiction

The Hospital, a corporation, operates an acute care hospital at its facility in Los Angeles, California, where it annually derives gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$5,000 directly from points located outside the state of California. The Hospital admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Sodexo, a corporation, with a place of business in Gaithersburg, Maryland, is engaged in the business of providing food and environmental services. It annually provides services for the Hospital valued in excess of \$50,000. Sodexo admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

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Facts

The Hospital operates an acute care facility of about 500,000 square feet with about 300 patient beds. It typically has over 200 patients and employs over 1250 workers. Patients and visitors enter the facility through two entrances; each entrance has a staff desk where visitors and patients are required to sign in. The Hospital provides each employee with an identification badge; the badge allows them to enter the Hospital through employee entrances and enter areas inside the Hospital not accessible to nonemployees.

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Sodexo operates a cafeteria in the Hospital and prepares and serves food to the patients. Members of the public are not allowed in the cafeteria. Sodexo is required to have its employees follow the same work rules that the Hospital requires of its employees.

At all times material the Hospital has maintained and enforced the following rule:

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Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

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- 1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
- 2. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

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3. Any employee who violates this policy will be subject to disciplinary action.

The Hospital carried over this rule from its predecessor employer. Sodexo also posted the same rule for its employees working at the Hospital. The Hospital has enforced the rule by disciplining employees who gained access to the interior of the hospital in violation of the rule, including, in this case, off-duty employees who entered the Hospital and engaged in union activities.

Mathew F. McElrath is the Hospital's chief human resources officer. McElrath credibly explained that the Hospital needs the rule to assist in providing a safe and efficient environment for on-duty employees, patients and visitors. The rule allows the Hospital to maintain control of the times that employees have access to patient records and to sensitive areas of the Hospital. In this regard the rule allows the Hospital to assure that employees are accessing that information or are in those areas only when the employees are being properly supervised. McElrath also explained that if off-duty employees enter the facility and began performing work, the Hospital may be required to pay them, perhaps at an overtime rate, even though the Hospital had not authorized the work.

As written, the rule allows off-duty employees to enter the Hospital under three circumstances. First, off-duty employees may enter the Hospital to visit patients. Of course, members of the public are also allowed to visit patients. Off-duty employees visiting patients must do so under the same conditions as all other visitors. That is, they must enter the facility at the entrances used by visitors; they may not enter through employee entrances. The visiting employees must confine their visits to visiting hours, sign in at visitors' desks, obtain and display a visitor badge, and confine their presence in the facility to the area needed to accomplish the visit. Second, off-duty employees may enter the facility to obtain medical treatment. Here too the off-duty employees are treated just as others obtaining medical treatment; they undergo an admitting process, are given a wristband and otherwise treated as a patient. Third, the rule allows off-duty employees to enter the facility to conduct hospital related business, which is defined as "the pursuit of the employee's normal duties or duties as specifically directed by management." In this regard McElrath explained that under this exception employees are always on paid time and under the supervision of the Hospital. In other words, this third "exception" is not really an exception at all and simply amounts to a definition of on-duty employees.

In sum, I conclude that the rule allows off-duty employees to enter the Hospital only under circumstances that members of the public at large are allowed, and then only under the same restrictions and conditions that members of the public are allowed inside.

40 Analysis

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The General Counsel stipulated that he is challenging the facial validity of the rule and that this case does not involve issues of selective enforcement or dissemination of the rule.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board applied a three-prong test to determine whether no-access rules are lawful. First, the rule must limit access of off-duty employees only to the interior of the facility. Second, the rule must be clearly disseminated to all employees. And third, the rule must apply to off-duty employees seeking access for any purpose and not just to employees seeking to engage in union activity. The General Counsel does not challenge the rule on the basis of the first two points; he does, however, contend that the rule is unlawful under *Tri-County* because it does not bar all off-duty employees from reentering the Hospital. I conclude that this interpretation of *Tri-County* is too literal and results in

consequences not intended by that decision. Under the General Counsel's interpretation, for example, a retail business could bar off-duty employees from its store only if it also banned them from shopping there; certainly the Board in *Tri-County* did not intend such a result. Likewise, in this case I conclude that the Board did not intend that a hospital could bar access only if it also barred its employees from becoming patients or visiting patients.

The General Counsel's reliance on *Baptist Memorial Hospital*, 229 NLRB 45 (1997), enfd. *Baptist Memorial Hospital v. NLRB*, 568 F.2d 1 (6th Cir. 1977) is misplaced. A careful reading of that case shows that the no-access rule at issue there was not limited to the interior of the facility and was not clearly disseminated to the employees; the Board did not find the rule unlawful simply because the hospital there allowed employees to visit patients and pick up their paychecks. Moreover, here the record is clear that when the Hospital's off-duty employees visit patients they must do so as visitors and not as employees. The General Counsel also relies on *Intercommunity Hospital*, 255 NLRB 468 (1981). There the Board stated:

The Employer's rule states, "When you are off duty, visits to the hospital should be limited to friends or relatives who are patients or on official business with the hospital." The rule on its face does not prohibit access for all purposes. In addition, employees testified that they were permitted to remain in the hospital after work while waiting for rides or carpools. As the Employer's rule does not meet the *Tri-County* standard, it cannot be used to prohibit solicitation by off-duty employees.

Id., at 474. But this statement is not sufficiently clear, at least to me, that the Board was holding that simply allowing off-duty employees to visit patients in a hospital would taint a no-access. This is especially so in light of the rule at issue in *Southdown Care Center*, 308 NLRB 225, 232 (1992), which allowed off-duty employees to come to a health care facility if they "... [have] family or friends in the home [to] visit . . . but [they] must follow visitor rules." There, Administrative Law Judge Richard Judge Linton held: "On its face, [the home's] limited-access rule complies with the *Tri-County* conditions." And here, unlike *Intercommunity*, the rule's reference to "official business" is clarified on its face to mean "the pursuit of the employee's normal duties or duties as specifically directed by management."

In San Ramon Medical Center, JD(SF) 83-03 (2003), (2003 WL 22763700) Administrative Law Judge James Kennedy found that a rule similar to the rule in this case was lawful under *Tri-County*. Earlier, in *Garfield Medical Center*, JD(SF) 81-02 (2002) (2002 WL 31402769) Administrative Law Judge Lana Parke likewise found a rule similar to the one at issue in this case to be lawful. Although I acknowledge that no exceptions were filed to those decisions and thus they do not have the binding effect of Board decisions, it is of some persuasive value that two of my colleagues independently reached the same result I reach in this case. Finally, in a case apparently still pending before the Board, *Citrus Valley Medical Center*, JD(SF) 42-08 (2008), I concluded: "In applying *Tri-County* I believe I should not literally apply its language concerning off-duty employees having access to a facility for 'any purpose."

Finally, the General Counsel presented the testimony of Julio Estrada, who has worked for the Hospital since 1994; he currently works as a lead respiratory therapist. Estrada gets paid every two weeks and he does not have his pay deposited directly to his bank account. Sometimes his payday falls on a day when he is not scheduled to work and sometimes, rather than waiting until his next workday to get his check, he enters the facility while off duty and retrieves the check. He does so using his employee badge. Over about a five-year period on about 10 occasions Estrada's supervisor saw him in the facility while off-duty yet the supervisor allowed him to pick up his check. I conclude this evidence does not warrant a different result in

this case for several reasons. First, the complaint alleges and the General Counsel stipulated at trial that he was only challenging the facial validity of the rule and was not alleging any violation of the rule as applied. This evidence is contrary to the narrow allegations of the complaint and the stipulation and thus the Hospital has not been accorded due process by allowing it to mount a defense. Second, even if I consider the evidence it is, at most, a *de minimis* abrogation of the application of the rule. Considering the size of the Hospital and the number of employees, a 100 percent rigid application of the rule cannot be expected.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

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ORDER

The complaint is dismissed. 15 Dated, Washington, D.C., April 8, 2011. 20 William G. Kocol Administrative Law Judge 25 30 35 40 45

 ² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.